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Supreme Court of the United States

OCTOBER TERM, 1926.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

CARL ROCHLING, *et al.*, trading as Gebrueder Rochling,

Respondents.

BRIEF FOR PETITIONER

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Brief of the Argument.

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Supreme Court of the United States.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

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CARL ROCHLING, et al., trading as GEBRUEDER ROCHLING,

Respondents.

BRIEF FOR PETITIONER.

Previous Opinions in the Present Case.

The report of the Special Master, recommending the disallowance of the respondents' reclamation claim filed in the bankruptcy proceedings of Knauth, Nachod & Kuhne, appears on page 24 of the Record and is reported in 6 A. B. R. (n. s.) 460. The District Court affirmed the Special Master's report and its opinion is found on page 32 of the Record and is reported in 6 A. B. R. (n. s.) 460. The opinion of the Circuit Court of Appeals reversing the District Court and allowing respondents' claim appears on page 34 of the Record and is reported

in 10 Fed. (2d) 935, under the name of *In re Gubelman*. That opinion is in part based upon the same Court's opinion in *Ex parte Latzko & Popper*, 10 Fed. (2d) 926. The latter case is also before this Court upon two writs of *certiorari* in Nos. 337 and 338.

Ground for Jurisdiction.

The case is before this Court by reason of a writ of *certiorari* which on April 26, 1926, was granted under Judicial Code, Section 240, paragraph (a), amended by the Act of February 13, 1925, to review a judgment of the Circuit Court of Appeals for the Second Circuit (R., 36).

The Question Presented.

Respondents seek to reclaim the proceeds of two checks which passed through the New York Clearing House after the filing of the petition in bankruptcy. The facts are undisputed, and the question of law presented is whether the bankrupts had become owners of the checks prior to the filing of the petition or whether on that date the bankrupts held the checks for collection. If the former, the respondents are only general creditors and the judgment of the Circuit Court of Appeals must be reversed.

Statement of Facts.

The bankrupts were private international bankers in New York City. The respondents are bankers in Frankfort, Germany (R., 15). They maintained a general deposit account in New York with the bankrupts at the

time of the bankruptcy and had done so for a period of over two years prior thereto (R., 22).

The National Bank of Commerce Check.

On May 14, 1923, respondents purchased from Lloyd's Bank, Ltd., $30,000 *payable in New York on June 15, 1923*; and on June 11, 1923, respondents wrote to Lloyd's Bank, Ltd., and requested that bank "to procure this amount" ($30,000) "for us at Knauth, Nachod & Kuhne, New York" *on June 15, 1923* (Exs. A and B, R., 12, 13). Lloyd's Bank, Ltd., thereupon instructed the National Bank of Commerce in New York as follows (Ex. C. R., 13):

> "Pay 30,000 *value fifteenth* to Knauth, Nachod & Kuhne, New York for account of Rochling Bank, Gebt. Frankfort-on-Main."

Pursuant thereto and on June 15, 1923, during banking hours, the National Bank of Commerce delivered to the bankrupts its Cashier's check (Ex. D. opp. R. 12), for $30,000 payable to the order of bankrupts "for account of Rochling Bank, Gebt. Frankfort-on-Main" (R. 21). Bankrupts gave to the National Bank of Commerce a receipt for the check "for account of Rochling Bank, Gebt. Frankfort-on-Main, in accordance with instructions dated 6/11/23, received from London, England, Lloyd's Bank, Ltd" (Ex. E. R. 13).

The National City Bank Check.

On May 15, 1923 (Ex. G, R. 15), respondents purchased from the Swiss Bank Corporation another $30,000 also

payable in New York *on June 15, 1923;* and on June 11, 1923, respondents wrote to Swiss Bank Corporation and requested that bank "to procure this amount" ($30,000) "for us at Knauth, Nachod & Kuhne, New York" *on June 15, 1923* (Ex. H., R. 15).

The Record does not show what, if any, instructions were given by the Swiss Bank Corporation to the National City Bank, but does show that on June 15, 1923, during banking hours, the National City Bank delivered to the bankrupts its Cashier's check (Ex. I., R. 22), for $30,000, payable to the order of bankrupts, "A/C Gebr. Rochling, Frankfort A/M" (R. 22). The form of receipt given by the bankrupts in this instance read: "Received from the National City Bank of New York $30,000 A/C Gebr. Rochling, Frankfort A/M" (R. 13).

Steps Taken by Bankrupts Upon Receipt of the Checks Here Involved.

On June 15th, 1923, and immediately following the receipt by the bankrupts of the checks from the National Bank of Commerce and the National City Bank, the bankrupts, in accordance with the usual practice hereafter referred to, credited the account of respondents with the amounts of the checks. *They also made an entry on their books that respondents were entitled to interest on the $60,000 so credited from June 15, 1923* (R. 21, 22).

Thereafter on June 15, 1923, the Bank of Commerce check was deposited by the bankrupts in the Guaranty Trust Company where the bankrupts maintained a general checking account; and on the same day the National City check was deposited by the bankrupts in the Amer-

ican Exchange National Bank where the bankrupts also maintained a general checking account (Ex. D and I, Opp. R. 12 and 14). Said two banks on June 15, in turn credited the respective amounts of said checks to the accounts of the bankrupts (Petition paragraphs 17 and 39, R. 5 and 9, not denied).

Course of Dealing Between Respondents and Bankrupts.

THE RECORD CONTAINS THE FOLLOWING STIPULATED FACTS (R., 22) AS TO THE PRIOR DEALINGS BETWEEN THE PARTIES:

> "THAT KNAUTH, NACHOD & KUHNE FREQUENTLY AND FROM TIME TO TIME IN THE REGULAR COURSE OF THEIR BUSINESS WITH CLAIMANT, EXTENDING OVER A PERIOD OF TWO YEARS, RECEIVED CHECKS FROM NEW YORK BANKING INSTITUTIONS UNDER CIRCUMSTANCES SUBSTANTIALLY THE SAME AS THOSE SET FORTH IN CLAIMANT'S PETITION, AND THAT IN ALL SUCH CASES THE PRACTICE ABOVE OUTLINED WITH RESPECT TO THE CREDITING AND THE ALLOWANCE OF INTEREST ON THE $30,000 CHECKS RECEIVED FROM THE NATIONAL BANK OF COMMERCE AND THE NATIONAL CITY BANK OF NEW YORK, RESPECTIVELY, WAS FOLLOWED; THAT IN ALL SUCH CASES AND IN THE TRANSACTIONS INVOLVING THE AFOREMENTIONED $30,000 CHECKS, CLAIMANT HAD KNOWLEDGE OF THE DATES ON WHICH CHECKS WERE INSTRUCTED TO BE DELIVERED TO KNAUTH, NACHOD & KUHNE IN NEW YORK, AND SUBSEQUENTLY WERE NOTIFIED OF THE DATES OF ACTUAL DELIVERY.
>
> THAT KNAUTH, NACHOD & KUHNE PERIODICALLY SENT TO CLAIMANT STATEMENTS OF THE LATTER'S ACCOUNT WITH KNAUTH, NACHOD & KUHNE, WHICH STATEMENTS SET FORTH AMONG OTHER THINGS SUMS

CREDITED TO THE ACCOUNT OF CLAIMANT, THE DATE OF EACH CREDIT, AND A CREDIT OR CREDITS FOR ACCRUED INTEREST COMPUTED UPON SUMS CREDITED FROM THE DATES OF THE CREDITS AFOREMENTIONED."

The Filing of the Petition in Bankruptcy and Transactions Occurring Thereafter.

On the morning of June 16th, 1923, the day after the receipt of the checks by bankrupts and their deposit with the Guaranty Trust Company and the American Exchange National Bank, the petition in bankruptcy herein was filed. The checks were paid to the Guaranty Trust Company and the American Exchange National Bank through the New York Clearing House on the morning of June 16th, after the filing of the bankruptcy petition (Petition R. 9 and 10, not denied).

Thereafter the Guaranty Trust Company and American Exchange National Bank liquidated collateral loans made to the bankrupts prior to the filing of the petition, and turned over to the Receiver a surplus of cash and securities remaining after such liquidation (Petition R., 7 and 11 not denied). It is against these funds that respondents assert their reclamation rights.

The Decision Below.

The Special Master and the District Court denied the respondents' petition on the ground that title to the checks had passed to the bankrupts on June 15th and that on that day respondents became general creditors. The Circuit Court of Appeals, however, reversed the decision of the District Court and held, in effect, that the checks

were received by the bankrupts in a fiduciary capacity until collected, and that as they were not collected until after the bankruptcy the proceeds did not become a part of the general assets of the estate.

BRIEF OF THE ARGUMENT.

The petitioner contends:

I

That as between the bankrupts and their customers, the respondents, the capacity in which the bankrupts received checks, deposited by third parties "for account of" the respondents, depends upon the intention of the bankrupts and the respondents. In the present case the evidence is clear that their intention was that title to such checks should pass to the bankrupts upon their receipt by the bankrupts, and that contemporaneously therewith the bankrupts should establish a credit in favor of the respondents for the amount of such checks and thus become generally indebted.

A. That there is a general presumption in favor of the existence of a debtor-creditor relationship.

Foley vs. *Hill*, 2 H. L. 28;
Bank of Republic vs. *Millard*, 10 Wall., 152;
Burton vs. *United States*, 196 U. S., 283;
Cragie vs. *Hadley*, 199 N. Y., 131;
Metropolitan National Bank vs. *Loyd*, 90 N. Y. 530;
City of Douglas vs. *Federal Reserve Bank*, 46 Sup. Ct., 554, 70 L. Ed., 620.

B. That in the present case petitioner has offerred convincing affirmative evidence supporting the presumption of the existence of a debtor-creditor relationship.

(a). That the crediting of respondents' account immediately on the bankrupts' receipt of the checks and the allowance of interest from that date is almost conclusive evidence of the existence of a debtor-creditor relationship.

Upshur vs. *Briscoe*, 138 U. S. 365;
Pittsburgh National Bank of Commerce vs. *McMurray*, 98 Pa., 538;
Ames, Cases on Trusts (2nd Ed., 1893), page 33, note 1.

C. That there is no evidence in the record controverting the existence of a debtor-creditor relationship.

II

The words "for account of" on the face of the checks delivered to the bankrupts by the National City Bank and the Bank of Commerce were merely for the purpose of informing the bankrupts on whose account the money was being paid. They were not intended to and could not determine or vary the nature of the relationship existing *as a fact* between the respondents and the bankrupts. The beneficial title to the checks upon their re-

ceipt must be determined by the arrangements between the bankrupts and the respondents and not by the acts of third parties.

A. That the court below erred in concluding that the words "for account of" in the present case, though used by third parties (the New York banks) must determine the rights, not of those third parties whose rights are not in question, but of two other parties, the bankrupts and the respondents, irrespective of what in fact is the actual relationship of those two parties as a result of their own arrangements.

B. That the court below erred in concluding that the words "for account of" must always have the same meaning irrespective of the circumstances in which they are used.

(a). The New York banks in delivering their checks to the order of the bankrupts "for account of" respondents did not *intend* to constitute the bankrupts agents for collection.

(b). The inapplicability of *White* vs. *Miners National Bank* and similar cases.—Endorsement for account of *endorser* distinguished from endorsement for account of *third party.*

New York Negotiable Instruments Law, Secs. 66 and 67 (Uniform Act Secs. 36 and 37);

Hook vs. *Pratt,* 78 N. Y., 381.

(c). Extrinsic circumstances may be examined to determine the meaning of a term as used under the circumstances no matter how well known and definitely decided its common meaning.

United States vs. *Bethlehem Steel Co.*, 205 U. S., 105;
Middleworth vs. *Ordway*, 191 N. Y., 404;
Price vs. *United States*, 269 U. S., 492.

(d) The parole evidence rule is not binding on persons not parties to the written instrument.

Central Coal & Coke Co. vs. *Good & Co.*, 120 Fed., 793, 799, and cases there cited.

C. The Court below erred in concluding that since the appearance on the face of the checks of the words "for account of" might affect the bankrupts' power of disposing of the checks, that fact is material in determining the relationship between the bankrupts and the respondents and the capacity in which the bankrupts received the checks.

D. The court below erred in failing to find as a fact the existence of an agreement between the bankrupts and the respondents that a debtor-creditor relationship was to exist, although it admitted that irrespective of the form of the checks such an agreement would be controlling.

III.

That in transactions between banks, such as those here involved, the strongest evidence should be required of that party who asserts that the relationship between a banker and its depositor is other than the ordinary one of debtor-creditor—a relationship which is essential for the conduct of modern banking. That only by clear and convincing proof should the burdens of a fiduciary relationship be imposed upon a banker. That the respondents here have wholly failed to meet the burden which was theirs.

POINT I.

As between the bankrupts and their customers, the respondents, the capacity in which the bankrupts received checks, deposited by third parties for account of the respondents, depends upon the intention of the bankrupts and the respondents. In the present case, the evidence is clear that their intention was that title to such checks should pass to the bankrupts upon their receipt by the bankrupts, and that contemporaneously therewith the bankrupts were to establish a credit in favor of the respondents for the amount of such checks and thus become generally indebted.

A. General Presumption in Favor of a Debtor-Creditor Relationship.

Of course the relationship ordinarily existing between a bank or banker and depositor is that of debtor and

creditor, and not principal and agent or trustee and *cestui*. Since the leading cases of *Foley* vs. *Hill*, 2 H. L. 28, and *Bank of Republic* vs. *Millard*, 10 Wall. 152, this relationship has been recognized. In the latter case, this Court said:

> "It is an important part of the business of banking to receive deposits, but when they are received *unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys.* The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositor shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst and Campbell in the House of Lords in the case of *Foley* vs. *Hill*, 2 Clark & Finnelly, 28, and they all concurred in the opinion that the *relation between a banker and customer, who pays money into the bank,* OR TO WHOSE CREDIT MONEY IS PLACED THERE, *is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character,* and the great weight of American authority is to the same effect."*

Whether, therefore, the *depositor* sends *money* to his banker, or money is sent *for his account* by third parties, by the depositor's direction or with his knowledge, the title to the money passes to the banker and simul-

*Italics throughout are inserted by counsel.

taneously therewith there springs up a debtor and creditor relationship between the banker and his depositor.

The foregoing general rule of *Foley* vs. *Hill* and *Bank of Republic* vs. *Millard* as to the effect of the deposit of *money* by the depositor himself has been extended by the leading cases in this Court and in New York to the deposit of *checks* and other instruments by the depositor himself where the deposit has not been made under special circumstances or in pursuance of a special agreement showing that a different relationship, in fact, was *intended* to be created. Thus in *Cragie* vs. *Hadley*, 99 N. Y., 131, quoted with approval by this Court in *Burton* vs. *United States* (1905), 196 U. S., 283, at 302, the New York Court of Appeals said:

> "The general doctrine that upon a deposit being made by a customer, in a bank, in the ordinary course of business, of money, *or of drafts or checks received and credited as money*, the title to the money, *or to the drafts or checks*, is immediately vested in and becomes the property of the bank, is not open to question. (*Commercial Bank of Albany* vs. *Huges*, 17 Wend., 94; *Metropolitan Nat. Bank* vs. *Loyd*, 90 N. Y., 530). The transaction in legal effect is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

In *Metropolitan National Bank* vs. *Loyd*, 90 N. Y., 530, quoted with approval in the *Burton* case, the New York Court of Appeals said:

> "It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee, and, therefore, when by its directions the plaintiff received and gave credit for it upon account, it became its owner and entitled to the money which it represented. * * * If, as the appellant insists, the check had been deposited for a specific purpose—for collection, the property would have remained in the depositor, *but there is no evidence upon which such fact could be established, nor is it consistent with the dealings between the parties, or with any of the admitted circumstances.*
>
> "These show that it was the *intention* of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it, as Murray's agent."

In the *Burton* case (1905), 196 U. S., 283, the doctrine

of the foregoing cases was approved, and this Court said:

> "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. * * * There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated."

And further:

> "There was no agreement or undertaking of any kind other than such as the law makes from the

> transaction detailed, which was itself proved by uncontradicted evidence offered by the Government itself. In the absence of any special agreement that the effect of the transaction shall be otherwise (and none can be asserted here), there is no doubt that its legal effect is a change of ownership of the paper, and that the subsequent action of the bank in taking steps to obtain payment for itself of the paper which it had purchased can in no sense be said to be the action of an agent for its principal, but the act of an owner in regard to its own property."

The doctrine of the foregoing cases has recently been applied by this Court in *City of Douglas* vs. *Federal Reserve Bank of Dallas* (June 1, 1926), 46 Sup. Ct., 554, 70 L. Ed., 620.

Since the rule that the deposit of *money* by the bank's customer in the absence of a special agreement creates a debtor-creditor relationship has been extended to cases where *checks* are deposited by that customer, there is no reason why the same rule when applied to *money* deposited by third persons for the account of the depositor, should not likewise be extended to the deposit of *checks* by such third persons, *particularly when made pursuant to the depositor's direction as in the present case.*

The true test must be in all cases: Is there any evidence to show that as between banker and depositor a different relationship was intended to be created.

Of course, varying circumstances have been held sufficient to indicate that the relationship between banker and depositor was not *intended* to be that of debtor and creditor upon the deposit of checks, and that the relation-

ship was *intended* to be that of bailor and bailee, or principal and agent. Thus when a payee of a check *endorses* it to his banker "*for collection and credit,*" these words indicate that the payee-endorsor does not intend to deposit the check, but intends only to constitute the banker his agent for collection and intends that the amount thereof should only be credited to depositor's account when the instrument is collected, but that then and then only should the relation of debtor and creditor arise.

All of this is well established law, as are the decisions of the Courts in the numerous cases relied upon by the respondents, all to the effect that by endorsements in varying restrictive forms, the payee-endorsor does not *intend* to divest himself of title to the instrument, but intends to constitute the endorsee his agent for the purpose solely of collecting the check for the endorsor's account. *In other words, as between endorsor and endorsee, the words of restrictive endorsement are held to indicate the* INTENT *not to transfer beneficial title.*

Those cases are wholly inapplicable to the present situation. Here the legal relationship between the bankrupts and the respondents with respect to the checks must depend not upon the mere chance that the same words were used here by third parties—The City Bank and the Bank of Commerce—as are ordinarily used by endorsors to create an agency relationship, but must depend upon the intention of the bankrupts and the respondents, as evidenced not by the acts of third parties, but by their own prior acts in the light of the essential relationship existing between them.

Inasmuch as ordinarily, the relationship between bank-

er and depositor is that of debtor and creditor, the burden of proof is upon the respondents here to establish that some other relationship, such as principal and agent, existed. Here, however, *there is no evidence of a special agreement or that the relationship was other than ordinarily and presumptively exists,* or that the respondents intended to constitute the bankrupts their agents to collect checks sent to the bankrupts "for the respondents' account" (except *only* the chance use of the words "for account of" by the third party banks, the use of which will be discussed in the next Point). *In fact, the contrary appears without contradiction!*

B. Affirmative Evidence Supporting Presumption of Intention to Create Debtor-Creditor Relationship.

Respondents were foreign bankers; they had credits in Pounds in London (R. 12); they desired credits in Dollars in New York, and they desired to have them *on June 15th* (R. 12, 13). Accordingly, at respondents' request, instructions were given by the London banks to the two New York banks that each should pay $30,000 to the bankrupts "for account of" respondents on June 15th. There is no evidence of any *intention* to constitute the bankrupts agents or bailees of checks which might be deposited by New York banks with the bankrupts "for the respondents' account." What the respondents wanted was a credit on June 15th, and in all their prior transactions "under circumstances substantially the same" (R. 19), as those in the present case, they always desired credits on particular days, not checks deposited for the

proceeds of which they only would have received credit at a later date.

It is, of course, well known that it is of the utmost importance for banking houses engaged in international transactions and maintaining accounts in various foreign countries to have credits in their favor established on specific days in accordance with prior arrangements. This is so because the bankers must know in advance just when credit abroad is available to them. Where a credit in one country is established or purchased by the transfer of a credit in another—as in the present case the respondents arranged for the establishment of their New York Dollar credits by the transfer of London Pound credits—the additional reason for having the new credit established as of a definite date is that the banker does not desire to lose interest on his one credit—the London Pound credit in this instance—without on the same day being assured of receiving interest on the credit to be acquired—in this instance the Dollar credit with the bankrupts. In all their prior dealings where transactions were carried on "under circumstances substantially the same" the respondents accordingly "had knowledge of the dates on which checks were instructed to be delivered to Knauth, Nachod & Kuhne in New York" and subsequently were advised of the actual receipt of the checks when contemplated (R., 22).

What the respondents desired, what they intended to procure through these and through prior transactions—namely a credit upon a definite specified day, they did procure. On June 15, 1923, and on all the other occasions when transactions were carried out "under circum-

stances substantially'' similar, when the New York banks sent to the bankrupts their cashier's checks to the bankrupts' order ''for account of'' the respondents, the respondents' ''account'' on bankrupts' books (not some collection account) was immediately credited with the amount of the checks received *and interest was allowed from the date of the credit.* By that credit to the respondents' account and the allowance of interest, respondents' instructions were complied with and in banking parlance ''the credit was established.''

Although the effect of this crediting of interest is treated lightly by the Court below, it is the established rule of this Court and of courts generally that *the payment of interest is almost conclusive evidence of the existence of a debtor-creditor relationship.* Thus, in *Upshur* vs. *Briscoe* (1891), 138 U. S., 365, 375, this Court said:

> ''It was stated expressly that the annual payment of $700 was to 'be considered as interest upon the said amount of $10,000;' and that, in case Annie M. Andrews should marry and leave issue, the $10,000 should remain invested as theretofore, in the hands of Briscoe, and the 'interest' should continue to be paid as theretofore mentioned. These terms made Briscoe the owner of $10,000 in his own right. He had the right to use the money in any way he thought proper. *Presumably, he could not pay interest on it unless he invested it. The right to use it in any way he thought proper was repugnant to the idea of any fiduciary relation to the money, for there was no obligation upon him to keep it separate from his own money, or to put upon it any marks of iden-*

> *tification, or to invest it in any particular securities.* * * * The relation created was merely the usual one of contract between debtor and creditor."
>
> See also *Pittsburgh National Bank of Commerce* vs. *McMurray,* 98 Pa., 538;
> *Ames, Cases on Trusts,* (2nd Ed., 1893), page 33, note 1.

The immediate credit and payment of interest was the usual practice and every statement sent by the bankrupts to the respondents over a period of two years during which they did business with each other, indicated that such was the practice (R. 22). Having in mind the end which the respondents sought to accomplish in the present as well as in earlier transactions, and the fact that the acts of the bankrupts were acquiesced in and ratified by the respondents, the only conclusion that can be drawn is that the ordinary relationship of debtor and creditor arose between the bankrupts and the respondents when the Cashier's check of the New York banks were deposited with the bankrupts "for account of" respondents, and these checks were immediately credited to the respondents' account on June 15th and they were allowed interest from the time of such deposit.

C. Absence of Evidence Controverting the Existence of a Debtor-Creditor Relationship.

The Record will be searched in vain for any evidence to show that the *respondents intended* that the bankrupts should take the New York checks in any different ca-

pacity than prior checks had been taken or than cash would have been taken had the New York banks elected to carry out the instructions received by them from the London banks by delivering to the bankrupts cash instead of their own Cashier's checks. *Whichever method the New York banks would have used, they would have advised the bankrupts to credit the amount transmitted "for the account of" the respondents, or otherwise the bankrupts could not possibly have known for what purpose or for whose benefit the money was being transmitted.* Furthermore, since the respondents had contracted abroad for the New York credits *on June 15, 1923,* there is surely no reason to assume an intention on the part of the New York banks *not* to comply with their foreign correspondents' obligations—as they would have failed to comply had they delivered to the bankrupts checks for which respondents would only have received credit after collection and on some date later than June 15.

There is no reason why the Courts should be astute to discover special agreements that the relationship between the parties was intended to be other than that usually existing between banker and depositor. If such special agreements are desired, they may easily and clearly be made.

It is, of course, well known that since the decision of this Court in the *Burton* case, many of the banks throughout the country, in cases where they deem it necessary, have protected themselves from the application of the rule of that case by very definite special agreements found in pass-books or on deposit slips. These express

agreements have in many instances become necessary because banks with depositors of all classes doing a large and miscellaneous business found it unwise to assume the risk, flowing from the rule of the *Burton* case. *In the present case, however, no such special agreements have been shown,* nor from the very nature of the bankrupts' business, were such agreements necessary with customers, such as the respondents, for whose account New York Cashier's checks were being deposited. These were transactions between banks, not involving checks of unknown value on distant points. The bankrupts could well accept Cashier's checks of New York banks as money, and this it appears was their practice.

Despite the fact that it was respondents' burden to show the existence of a special agreement modifying the general rule, the Record is devoid of any evidence on that subject other than *petitioner's* special evidence in support of the existence of the general rule, to wit, his evidence to the effect that to the respondents' knowledge, it was the general practice to credit checks received immediately on their receipt and to allow interest to the respondents from that date.

D. Conclusion to Point I.

Accordingly, it is submitted, that unless varied by the single circumstance that the New York banks regularly carried out their obligation to create a credit on definite dates contracted for in advance by drawing their cashier's checks to the order of the bankrupts "*for account of*" respondents, the ordinary rule must apply, and the ordinary relation of debtor and creditor was created

from the time of the receipt and credit of the checks, and was unaffected by the subsequent bankruptcy. And it is, therefore, submitted that the doctrine of *Foley* vs. *Hill* and *Burton* vs. *United States,* is applicable and leads to the conclusion that beneficial title to the checks passed to the bankrupts on June 15th, and that thereafter, the respondents were no more than general creditors of the bankrupts.

It now will be shown in the succeeding Point that the use of the words "for account of" upon the face of the checks deposited does not affect the conclusion reached.

POINT II.

The words "for account of" on the face of the checks delivered to the bankrupts by the National City Bank and the Bank of Commerce were merely for the purpose of informing the bankrupts on whose account the money was being paid. They were not intended to and could not determine or vary the nature of the relationship existing as a fact between the respondents and the bankrupts. The beneficial title to the checks upon their receipt must be determined by the arrangements between the bankrupts and the respondents and not by the acts of third parties.

Four fundamental errors underlie the argument of the respondents and the conclusions of the court below:

1. That the words "for account of" in the present

case, though used by third parties (the New York banks), whose rights are not in question, must determine the rights not of those third parties, but of two other parties, the bankrupts and the respondents, irrespective of what, in fact, is the actual relationship between those two parties as a result of their own arrangements.

2. That the words "for account of" must always have the same meaning, irrespective of the circumstances in which they are used.

3. That the form of the instrument, since it might affect the bankrupts' power of disposing of the check, is material in determining the relationship betweeen the bankrupts and the respondents and the capacity in which the bankrupts received the checks.

4. While admitting that irrespective of the form of the instrument an express agreement would be controlling, the court failed to find the existence of such an agreement as a fact from the uncontradicted evidence.

The First Error.

In Point I it has already been shown that as between the bankrupts and the respondents, it was clearly the intention of both parties that only a debtor-creditor relationship should exist between them for deposits made to the credit of respondents' account, by New York banks. Since that is so, it is submitted that the acts of a third party—National City Bank or Bank of Commerce in this case—cannot and were not intended to affect the relationship between the other two parties. Without considering at this time the effect of the use

of the words "for account of" upon the rights or obligations of the New York transmitting banks, or even of still other parties to whom the checks might later be negotiated, petitioner contends that once the checks were delivered into the possession of the bankrupts, the legal result thereof *so far as respondents are concerned* and the rights of the respondents therein are governed not by the acts of those third party banks, but by the understanding existing between the bankrupts and the respondents.

That is, assume that an express written agreement existed between the bankrupts and the respondents that all checks deposited for the respondents' account—either by respondents themselves or by third party banks—should be immediately credited and, specifically, that title thereto should immediately pass to the bankrupts, with the resulting general indebtedness from the bankrupts to the respondents. Could it then be seriously contended that, whatever were the terms that appeared upon the face of the checks transmitted to the bankrupts, they could vary or affect the written agreement between the banker and his depositor *as between those two parties.* Could it be doubted that the rule of the *Burton* case would apply? The existence of such a contract between the bankrupts and the respondents has been shown in Point I by the course of dealings between them over a period of years. The reasons why such a contract was essential in the conduct of the business has also been shown. The acts of the National City Bank and the Bank of Commerce could not change that contract and were not intended to affect any change therein.

The Second Error.

Assume, however, that the intent of the New York banks is material in determining the relationship between the bankrupts and respondents. Then the second error of the court below is its decision in effect that in determining the New York banks' intent, their use of the words "for account of" *must* have the same legal results as when those words are used in the ordinary form of restrictive *endorsement*, such as existed in the leading case of *White* vs. *Miners National Bank*, 102 U. S., 658, and the long line of cases following it.

In point of fact, it is obvious that the City Bank and the Bank of Commerce *did not intend* to constitute the bankrupts either the agents of those banks to collect the checks, or the agents for the respondents. The respondents desired credits at the bankrupts on *June 15th* (Ex. B. R. B. and Ex. H. R. 15), and it was in pursuance of contracts made by the respondents with Lloyds Bank and the Swiss Banking Corporation for that purpose, and presumably to comply with and carry out the foreign banks' obligations under those contracts, that the National City Bank and the Bank of Commerce respectively made the payments to the bankrupts on June 15th. *By some method, these two banks had to inform the bankrupts why and for whose benefit the money was being paid, whatever the nature of that benefit.* This could have been done either by writing upon the face of the check that the amount was being paid for the "account" of the respondents, or by a separate covering communication, as was done in the case of one of the checks in the *Latzko* case, also now pending before this

Court. As was said by Judge Augustus Hand in his decision in the District Court in the *Latzko* case:

> "Instructions to place it to such account emanated from them (the New York banks), *and due to the necessity of indicating for whom the check was received, create a different situation from that in White* vs. *Miners National Bank*, 102 U. S., 658."

How other than by the use of the words "for account of" could the New York banks have indicated to the bankrupts the name of the person who had an "account" with them for whose benefit the checks were being transmitted? Clearly, the City Bank and the Bank of Commerce did not intend to constitute the bankrupts the agents of those very New York banks to collect their own cashier's checks. If the New York banks, in complying with instructions from abroad, had sent bullion instead of checks, they would, of necessity, have had to accompany it with the same information "for whose account" it was being paid. In these latter circumstances it could not seriously be urged that the *money* delivered to the bankrupts under instructions that it was "for account of" Rochling, was transmitted "for collection" or otherwise restrictively,—or other than as a deposit creating a debtor and creditor relationship. The mere fact that the payment was made by cashier's check which designated the "account" for whose benefit the payment was made, cannot change the result *unless the realities of the situation are to be ignored by the creation of some rule of thumb.*

It must also be borne in mind that if, as the respond-

ents contend, the New York banks intended to deliver the checks to the bankrupts for collection only and in a fiduciary capacity, the New York banks would not have been complying with the obligations of Lloyds' Bank London and the Swiss Bank Corporation under their contracts with respondents. Under those contracts the foreign banks had undertaken to procure for respondents, at Knauth, Nachod & Kuhne, the respective amounts of $30,000 *on June 15th, 1923* (Exs. A, B, G and H, R, 12, 13 and 15). It should not be presumed, in the absence of very clear and definite evidence, that the acts of the New York banks in delivering their Cashiers' checks to the bankrupts were not in compliance with the engagements of the London banks on whose behalf the New York banks were acting. If, by any interpretation of the facts, the acts of the New York banks can be deemed a compliance with the foreign banks' obligations to respondents, the facts should be so interpreted. What these banks intended was that the bankrupts should, on receipt of the Cashiers' checks, give immediate credit to the respondents for the amounts thereof, which credits would, as a result, be immediately available to the respondents. Such a result could only be accomplished if the bankrupts acquired beneficial title to the checks immediately on their receipt. By accomplishing this result the obligations undertaken by the foreign banks would be performed. Had the New York banks intended that the checks should be delivered only for collection the result which they had undertaken to effect could not have been attained. Accordingly, it is clear that the words "for account of" were intended

to be words of identification and not words of limitation.

The Inapplicability of White vs. Miners National Bank, and Similar Cases.

The single argument advanced by the respondents and the court below to justify their ignoring the arrangement of the parties, as evidenced by their prior dealings, is that in a line of cases involving one form of restrictive *endorsement* and not dealing at all with the banking transaction here involved, the words "for account of" have been held by Courts to result in an agency relationship. Assuming that cases relating to endorsements have any relevancy at all to the problem presented by the present set of facts, the distinction between those cases and the rule to be applied in the present case is recognized by the Negotiable Instruments Law itself.

Section 66 of the Negotiable Instruments Law of the State of New York (Laws 1909, Chapter 43), which is Section 36 of the Uniform Negotiable Instruments Act, provides:

> "Sec. 66. *When indorsement restrictive.* An indorsement is restrictive, which either:
>
> 1. Prohibits the further negotation of the instrument; or
>
> 2. Constitutes the indorsee the agent of the indorser; or
>
> 3. Vests the title in the indorsee in trust for or to the use of some other person.
>
> But the mere absence of words implying power to negotiate does not make an indorsement restrictive."

And Section 67 of the New York Act (Section 37 of the Uniform Act), provides as follows:

> "Section 67. *Effect of restrictive indorsement; rights of indorsee.* A restrictive indorsement confers upon the indorsee the right:
>
> 1. To receive payment of the instrument;
>
> 2. To bring any action thereon that the indorser could bring;
>
> 3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.
>
> But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement."

From the foregoing sections, it is apparent that restrictive endorsements fall into two classes:—

(a) Those for the benefit of the endorser himself; and

(b) Those for the benefit of a third person.

Where an instrument drawn by A to the order of B is endorsed by B to C for account of B or for B's benefit, then the rule is settled that B, the endorser, constitutes C merely the agent of B, and that neither the legal nor the beneficial title passes to C and that C becomes merely the agent of B to collect the instrument. In legal effect, the instrument is a mere power.

Where, however, an instrument drawn by A to the order of B is endorsed by B to the order of C for account of or for the use of *D*, then the rule is that B intends to and does divest himself of all legal title and that C obtains the legal title to the instrument which he holds *prima facie* for the use of D.

But in this second class of cases, it is apparent that the question remains open as between the endorsee (C) and the third party (D), whether C, the endorsee, takes not only the legal title, but as against D, also the beneficial title. That question is one which depends wholly upon the arrangement which, in fact, exists between C and D. If by agreement, express or implied, they have arranged that upon the receipt of this type of instrument, both legal and beneficial title shall pass to C and that a mere debtor and creditor relationship shall spring up, that is no concern of B who has divested *himself* of all interest in the instrument. If, in fact, no such agreement has been made, either expressly or by a course of conduct, or by any other method, then, of course, C would hold the proceeds for the use of D.

With these fundamental distinctions in mind, it becomes apparent that even if the principles underlying the restrictive endorsement cases are at all relevant here, the cases relied upon by the respondents are not inconsistent with the contentions of the petitioner.

The respondents and the court below relied mainly, if not entirely, on a line of cases which have as their original authority the decision of this Court in *White* vs. *Miners National Bank* (1880) 102 U. S., 658. An analysis of the *White* case, which is for this purpose an analysis of all of the cases following it, and a comparison of its facts with those of the present case furnishes the best illustration of why those decisions are inapplicable to the present circumstances and why the District Court was correct in holding that the checks in the

present case had *not* been deposited for collection. In the *White* case the Miners Bank, the payee, by its president Brownell, endorsed drafts to the plaintiff White in the following manner:

> "Pay S. V. White or order for account Miners Bank, Georgetown, Colorado. J. L. Brownell, P't."

White paid the bank the amount of the drafts less a discount, and when the drafts were not paid at maturity sued the bank both on its endorsement and for money paid to the bank's use. The decision of this court was that the plaintiff might recover on its second count for money paid but in the course of its opinion, at page 661, it stated that:

> "It seems to us that the Court below correctly construed the effect of the endorsement to be to make White the agent of the bank for the collection of the money."

But in the *White* case, as in all of the other cases relied upon by the respondents, the endorser endorsed to the endorsee for the *endorser's benefit*, and therefore intended to constitute the endorsee the endorser's agent to collect the drafts—a mere power—an endorsement of the first class under New York N. I. L., Sec. 66, quoted *supra*. Under these circumstances, neither legal nor beneficial title passes to the agent. *In none of these cases, however, was the question presented as to the respective rights of the endorsee and the third party for whose account the endorsement was made*—an endorsement of the second class under Sec. 66. In all the cases

relied on by respondents, the question was either as to the respective rights of the endorser and endorsee, or of the endorsee or a subsequent holder, as against the maker. In none was there proof of the actual relation between the endorsee and the third party, nor proof as to what their respective rights and obligations were or their respective intentions. In none was the instrument drawn at the instigation of the endorsee.

Again, in the *White* case, as in all of the cases relied upon by respondents, the defendant-endorser had no account with the endorsee (White) for which "account" the endorsee received the drafts and to which "account" the amounts of the drafts were to be credited. The natural and reasonable construction of the endorsement in those cases was that the endorser (Miners Bank) intended to constitute the endorsee (White) its agent to collect the drafts from the third party drawees. Just as in the present circumstances the use of the words "for account of" could not have been avoided if the bankrupts were to be instructed for what purpose the payments were being made to them, so in the *White* case the use of the words "for account of" could have had no other meaning or purpose than to constitute the endorsee an agent for collection. In the *White* case the words did not have to be used to explain the source of the payment inasmuch as the transaction was between the only two interested parties. There was no payment by a third party for *another's* "account" which required explanation.

The portion of this Court's opinion in the *White* case that parole evidence could not be offered to vary the

meaning of the written words "for account of" has no application to the present circumstances. As stated by this court in its opinion at page 660:

> "The plaintiff in the White case sought to show by parole testimony that he had 'bought and paid full value for the drafts, *with the understanding that he was buying it as commercial paper* with the usual incidents of such a transaction'."

Plaintiff White was not offering parole evidence to *explain* the meaning of the words "for account of." His only effort was to contradict them and *deny them any meaning* by offering parole evidence of a separate and distinct agreement allegedly made at the time of the endorsement and transfer of the drafts. In the present case there is no such attempt on petitioner's part to disregard the words "for account of" or to deny them meaning. Petitioner's position, on the contrary, is that when the words are interpreted in the light of the circumstances attendant upon the delivery of the checks to the bankrupt it clearly appears that the words are nothing more than a designation of the "account" on bankrupts' books entitled to be credited. This involves simply a consideration of the surrounding circumstances not to vary but to explain the meaning of words. It seems superfluous to cite *in extenso* authority in support of the court's right to consider extrinsic circumstances in interpreting a written instrument. Only two leading cases will therefore be referred to, one in this court, and one in the New York Court of Appeals.

In *United States* vs. *Bethlehem Steel Co.* (1906), 205 U. S., 105, the Supreme Court sustained the lower court

in the latter's consideration of certain letters between the parties prior to the execution of a contract as an aid to the interpretation of that contract. The contract by its terms provided for a "penalty" in the event of a default by one of the parties. There subsequently was a default and when the injured party sued to recover the amount of the "penalty" as liquidated damages, he offered in evidence various letters passing between the parties in support of his contention that though the word "penalty" was used, the parties had intended to provide for liquidated damages. An objection was taken to the admission of such extrinsic evidence. The unanimous court through Mr. Justice Peckham held the evidence admissible saying (page 117, *et seq.*):

> "It is objected on the part of the Company that as the contract in question is, as asserted, plain and unambiguous in its terms, no reference can be made to other evidence or to documents which do not form part of the contract. The general rule that prior negotiations are merged in the terms of a written contract between the parties is referred to and it is insisted that under that rule the various letters passing between the parties prior to the execution of the contract are not admissible.
>
> "The rule that prior negotiations are merged in the contract is general in its nature and, we think, does not preclude reference to letters between the parties prior to the execution of the contract in this case. * * * While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet we think that much light is given

as to the true meaning of language that is not wholly free from doubt by a consideration of the correspondence between the parties before the final execution of the contract itself. *Under such circumstances we think it never has been held that recourse could not be had to the facts surrounding the case and to the prior negotiations for the purpose of determining the correct construction of the language of the contract. Simpson* vs. *United States,* 199 U. S., 397-399. In *Brawley* vs. *United States,* 96 U. S., 168-173, the court says: 'Previous and contemporaneous transactions may be all very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms.'

"It is not for the purpose of making a contract for the parties, but to understand what contract was actually made, that in cases of doubt as to the meaning of language actually used prior negotiations may sometimes be referred to. * * *

"It is true that word 'penalty' is used in some portions of the contract, although in the clause providing for the $35 per day deduction that word is not used, nor are the words 'liquidated damages' to be found therein. The word 'penalty' is used in the correspondence, even by the officers of the Government, but we think it is evident that the word was not used in the contract nor in the correspondence as indicative of the technical and legal difference between penalty and liquidated damages. It was used simply to provide that the amount named might be deducted if there were a delay in delivery."

Similarly in *Middleworth* vs. *Ordway* (1908), 191 N. Y., 404, a contract was made between an infant's father and the infant's proposed foster parents, providing that the infant upon reaching the age of 18 years should be entitled to her "dower right" in the property of her foster parents, "the same as though she were their own legitimate offspring." The court held that although no "dower right" exists in favor of a child, natural or adopted, the court could properly go beyond the terms of the written contract to consider the circumstances of the case in support of its conclusion that "dower right" under the circumstances meant that portion of the foster parents' estate which a legitimate child of theirs would receive upon their death intestate. The court in summarizing the basis of this conclusion said:

> "We decide the case on the face of the written instrument, which was not disputed, and which is the only contract that the law recognizes as having been made. While the conversations were inadmissible for the reason given, the circumstances surrounding the parties when they signed the instrument were properly shown to prove delivery (*Chouteau* vs. *Suydam*, 21 N. Y., 179), and for the purpose of enabling the court to see whether their situation reflected light upon the words used in reducing their agreement to writing (*Thomas* vs. *Scutt*, supra). In other words, while the law excludes parol evidence of their expressed intention, it receives evidence to show their situation and the occasion which led to the contract."

Respondents here have contended that the "ordinary legal significance" of the term "for account of" is defi-

nite and unambiguous and that, therefore, no extrinsic circumstances should be considered. Certainly the two terms "penalty" and "dower" ordinarily have definite and unambiguous meanings in the law. Nevertheless, this Court and the New York Court of Appeals justified an examination of circumstances extrinsic to the documents in which such terms occurred to sustain an interpretation of those terms different from their "ordinary" meaning. Surely the word "debt" is as definite as "account," and yet "debt" has been construed in this Court under certain circumstances to include taxes and under other circumstances to exclude taxes.

Price vs. *U. S.* 269 U. S., 492.

In short the terms "penalty" and "dower" and "debt" in the *Bethlehem* and *Middleworth* and *Price* cases, and "for account of" in the present case are in no way contradicted or varied by a consideration of the extrinsic evidence as to the surrounding circumstances and the understanding of the parties. The fact is that on considering the extrinsic evidence their real meaning, under the circumstances, is ascertained, and in the instant case the meaning of "for account of" when so ascertained is clearly different from what the respondents please to call the "ordinary" meaning of the term.

Furthermore, irrespective of all the foregoing, the rule is elementary that in a controversy between a party to the instrument (here the bankrupts), and a third party (here the respondents) the parole evidence rule is in-

applicable and either party may even contradict the instrument by extrinsic evidence.

Central Coal & Coke Co. vs. *Good & Co.*, 120 Fed., 793, 799, and cases there cited.

In summary then, in the present case, the rights of the *respondents* are being considered and it is third parties, to wit, the *New York banks*, who used the allegedly restrictive words. Furthermore, in all the other cases which deal with *endorsements*, the only conceivable reason for the use of the words "for account of" was to create the endorsee a fiduciary, whereas in the present case, as has already been pointed out, *even if no fiduciary relationship was intended*, there would have been no other way for the New York bank to indicate the person to be benefited by the payment other than by the use of such or similar words. Nor did the New York banks have the right to determine as between the bankrupts and the respondents the effect of the deposit of the checks. *There is nothing in common between the circumstances of the present case and those of all of the other cases relied on by the respondents, other than the simple fact that the same words "for account of" were used.*

In the construction of contracts, as in the construction of statutes, the Court must determine from the surrounding circumstances and engagement of the parties the meaning of their words, and cannot blindly decide that words used in one sense in one place *necessarily* and *conclusively* mean the same when used under wholly different circumstances and by parties not similarly situated.

The Third Error.

The third error of the court below lies in its undue emphasis on the form of the instrument as a test of the relationship of the bankrupts and the respondents. The court argues that the words "for account of" on the face of the instrument "has limited the payee's free disposal of the check in the interest of another" (R. 34). Similarly in the *Latzko* case (R. in Nos. 337 and 338, p. 78), the court differentiated between the case in which the words "for account of" appeared on the face of the check and the case in which such words appeared only in a covering letter, holding that in the latter case the bankrupts took beneficial title and that in the former, they did not.

Petitioner contends that whatever effect the appearance on the face of the instrument of the words "for account of" might have to put subsequent transferees on notice to investigate what was *in fact* the relationship between the bankrupts and the respondents, and what, as a result thereof, was in fact the bankrupts' title, the mere fact that such notice is given does not in itself mean that the bankrupts did not acquire beneficial title to the check. *The actual relationship between the parties and the bankrupts' title depends entirely upon the arrangement between those two parties, the bankrupts and the respondents.* Since as a matter of fact, the relationship between those two parties was such that the title to the checks passed to the bankrupts, subsequent transferees, such as the Guaranty Trust Company and the American Exchange Bank in the present case, could acquire title there-

to. Thus, while the appearance on the face of the check of the words "for account of" might put the subsequent transferee on notice to investigate the transferor's title, in the present case such a transferee on investigation would have found that the bankrupts had title and the right to dispose of the checks. The only effect of the appearance on the face of the check of those words is *to put the transferee on notice—not to determine what is the fact.* The difference, therefore, between the case where the words "for account of" on the face of the check and the case where they do not is purely one of notice to a third party and not one determinative of the substantive rights between the payee and the person for whose account the check is paid.

The Fourth Error.

The fourth error of the court below lies in the fact that while it admitted that an "express" agreement would control over the form of the check, it concluded that the special agreement relied on here by the petitioner was "factitious" (R., 31). That the agreement between the respondents and the bankrupts was not factitious appears, it is submitted, from the analysis of the law and the facts as set forth at length in Point I. The court need only be reminded at this point that a presumption in favor of the existence of a debtor-creditor relationship exists as a result of this court's decision in the *Burton* case; that, therefore, the burden is on the respondents here to prove a special agreement resulting in the existence of a fiduciary relationship; that not only

is there no such rebutting evidence by the respondents in the Record but that, as set forth in Point I, the presumption created by the "Burton rule" is supported by the affirmative evidence that upon receipt of the checks by the bankrupts they were always immediately credited to the respondents' account and interest allowed from that day on the amount of the credit—and that all this was exactly what the respondents had contracted for and desired, the establishment of a credit on the very day that the checks were delivered.

POINT III.

In Conclusion.

This Court in *White* vs. *Miners National Bank, supra,* recognized the salutary principle that in construing commercial or banking transactions, courts should proceeed with caution. This principle is peculiarly applicable in the present case. Petitioner submits that in transactions between banks, such as those here involved, the strongest evidence should be required of that party who asserts that the relationship between a banker and its depositor is other than the ordinary one of debtor and creditor—a relationship which is essential for the conduct of modern banking. Only by clear and convincing proof should the burdens of a fiduciary relationship be imposed upon a banker. Petitioner submits that the

respondents here have wholly failed to meet the burden which was theirs.

The judgment of the Circuit Court of Appeals should be reversed, and the respondents' reclamation petition denied.

Respectfully submitted,

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